ENG BCA No. 5884
TRAYLOR BROS., INC. & S & M CONSTRUCTORS (JV)

Summary Disposition, Facts--Conjecture is without probative force, is insufficient to create a genuine issue of material fact and does not bar Summary Disposition

Latent Defect, Three Year Delay in Notice, Question of Law--In the circumstances presented, a delay of three years in providing notice of a latent defect was unreasonable as a matter of law.

Latent Defect, Content of Notice--To preserve rights, the content of a notice by a buyer of a latent defect need advise only that a claimed defect is apparently present.

Notice Clauses, Enforcement--Notice clauses in government contracts are frequently not enforced against contractors where the government knows or should know of the subject of the notice. Cases so holding do not apply to a situation where a government agency is seeking to construe, in its favor, its own contract, and where a contractor has no actual or imputed knowledge of the matter at issue.

BEFORE THE CORPS OF ENGINEERS BOARD OF CONTRACT APPEALS

Appeal of	)	
	)	
TRAYLOR BROS., INC. & S & M CONSTRUCTORS (JV)	)	ENG BCA No. 5884
	)	
	)	
Contract No. 1F0021	)	

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OPINION BY ADMINISTRATIVE JUDGE FRENZEN
ON
APPELLANT'S MOTION FOR SUMMARY DISPOSITION

Appellant has filed a Motion for Summary Disposition in this matter. An Opposition by Respondent and Reply by Appellant followed. The following are not in dispute:

1. On April 25, 1974, WMATA awarded a Contract in the amount of $35,742,897 to Traylor - S & M (JV) (Traylor - S & M or Appellant) for the construction of Section F-2a of the Washington Metrorail System. (Pleadings, ¶ 1; Contract 1F0021.)

2. The contract work included the construction of 16,300 square feet of Type 2 Floating Slabs. The floating slabs were part of a system designed to attenuate vibrations emanating from the operation of rail cars beneath the ground surface. (Pleadings, ¶ 2).

3. The technical requirements related to the floating slab work are set forth in Section 3.49 of the Technical Provisions of the Contract. Section 3.49 requires that the isolation pads pass a battery of tests related to their physical characteristics prior to approval for use. (Contract 1F0021).

4. General Provision Article 1.10, Inspection and Acceptance, provides, in part, as follows:

> Inspection and Acceptance
>
> (a) Except as otherwise provided in this Contract, inspection and test by the Authority of material and workmanship required by this Contract shall be made at reasonable times and at the site of the work, unless the Contracting Officer determines that such inspection or test of material which is to be incorporated in the work shall be made at the place of production, manufacture, or shipment of such material. To the extent specified by the Contracting Officer at the time of determining to make off-site inspection or test, such inspection or test shall be conclusive as to whether the material involved conforms to the Contract requirements. Such off-site inspection or test shall not relieve the Contractor of responsibility for damage to or loss of the material prior to acceptance, nor in any way affect the continuing rights of the Authority after acceptance of the completed work under the terms of paragraph (f) of this article, except as hereinabove provided.
>
> (b) The Contractor shall, without charge, replace any material or correct any workmanship found by the Authority not to conform to the contract requirements, unless in the public interest the Authority consents to accept such material or workmanship with an appropriate adjustment in contract price. The Contractor shall promptly segregate and remove rejected material from the premises.
>
> (c) If the Contractor does not promptly replace rejected material or correct rejected workmanship, the Authority (1) may, by contract or otherwise, replace such material or correct such workmanship and charge the cost thereof to the Contractor, or (2) may terminate the Contractor's right to proceed in accordance with Article 1.5 of these General Provisions.
>
> * * *
>
> (f) Unless otherwise provided in this Contract, acceptance by the Authority shall be made as promptly as practicable after completion and inspection of all

work required by this contract. Acceptance shall be final and conclusive except as regards latent defects, fraud, or such gross mistakes as may amount to fraud, or as regards the Authority's rights under any warranty or guarantee.

* * *

(Id.)

5. After award of the contract, Appellant, by and through a supplier, the Amber/Booth Company, offered in October of 1974 to substitute isolation pads made of polyurethane in lieu of isolation pads made of rubber or fiberglass. (Pleadings, ¶ 4).

6. WMATA approved the use of polyurethane as an isolation pad material in substitution for rubber and fiberglass on this Contract. (Pleadings, ¶ 6).

7. The polyurethane isolation pads used on this project were manufactured by Amber/Booth. The floating slabs and polyurethane isolation pads were installed by Traylor - S & M's subcontractor, Floating Slab Contractors. (Pleadings, ¶ 7).

8. Traylor - S & M's subcontractor installed the floating slabs and polyurethane isolation pads on the project by February 15, 1977. (WMATA Answers to First Set of Interrogatories, No. 6).

9. Traylor - S & M substantially completed the contract work, including the floating slab work as of September 1977, and WMATA tested, approved and accepted the floating slab work. (Pleadings, ¶ 9).

10. WMATA took possession of all work performed by Traylor - S & M, including the floating slab and isolation pad work, on September 6, 1977. (WMATA Answers to First Set of Interrogatories, No. 7).

11. The WMATA Contracting Officer authorized final payment on Contract 1F0021 on July 24, 1980 for all work performed under the Contract. (WMATA Supplemental Responses of October 28, 1996, to Traylor - S & M's First Request for Production of Documents).

12. On September 29, 1981, WMATA's inspectors reported the settlement of between ½ to 2 ½ inches of floating slabs within the Metrorail system. (R.4, Tab 27).[1]

[1]By stipulation of the parties entered into on November 19, 1996, it was agreed that the transcript, exhibits, and Rule 4 File admitted in the Appeal of Norair Engineering Corp., ENG BCA No. 5244, 92-2 BCA ¶ 25,009, could be relied on and considered by the Board in deciding this Motion.

13. On October 5, 1981, WMATA directed its General Engineering Consultant (GEC) to investigate the reports of settled floating slabs. (R.4, Tabs 26, 30).

14. As a result of a field survey conducted on or before October 19, 1981, WMATA received a report that the isolation pads under the affected floating slabs "show several wrinkles . . . indicating excessive compression." (R.4, Tab 29).

15. The GEC urged WMATA to take samples of the isolation pads to test "for possible deterioration due to moisture or otherwise." (R.4, Tab 29).

16. The GEC wanted to conduct such tests "[b]ecause the pads crumbled, we could see that. And we wanted to know why it was crumbled. We want a chemical analysis of it. * * * So my first impression was because of the water there, the pads failed." (Testimony of G.N. Sastry, Tr. 87-88).

17. By October 1981, WMATA had completed an initial floating slab system survey which concluded "[a]ll floating slabs throughout the operating system are down. Most of the slabs are just beginning to sink, but there are 7 slabs sunk to a level that required immediate attention." (R.4, Tab 31).

18. On December 7, 1981, the GEC was given a list of the subcontractors/suppliers of isolation pads throughout the Metro system by a second WMATA consultant, Bechtel Associates. Amber/Booth was identified as the supplier for the F-2a isolation pads. (R.4, Tab 40).

19. On August 25, 1982, the GEC informed WMATA that "[o]ur conclusions are that this chemical analysis [by the University of Akron] clearly indicates that the manufacturer (Amber/Booth) supplied defective pads." Consequently, the GEC recommended the testing include a chemical analyses of isolation pads from each remaining contract. (R.4, Tab 56).

20. WMATA notified Traylor - S & M of the alleged deficiencies in the isolation pads and that it was holding Traylor - S & M responsible for the costs associated with the correction of the allegedly defective isolation pads in the Final Decision of the Contracting Officer for Contract 1F0021 dated September 19, 1991. (WMATA Answers to First Set of Interrogatories, No. 19).

21. WMATA did not give Traylor - S & M the opportunity to inspect, remedy, or restore any damaged work which resulted from the defects in the isolation pads. (WMATA Answers to First Set of Interrogatories, No. 23).

DECISION

This is another decision in a set of cases dealing with noise and vibration isolation pads. The appeal is from a Contracting Officer's Final Decision making a claim against Appellant. The appeal is similar to several other appeals by other prime contractors involving Respondent's

allegations of delivery of defective vibration and noise isolation pads by a common supplier, the Amber-Booth Company of Texas. A brief history of decided appeals appears in Granite Groves (JV), ENG BCA No. 5896, 97-1 BCA ¶ 28,673.

The Board has authority to grant motions for summary disposition. H. Claterbos Co. (JV), ENG BCA No. 5300, 87-3 BCA ¶ 20,146. Summary disposition should be granted if there is no genuine issue of material fact and the movant is entitled to prevail as a matter of law. Mingus Constructors, Inc. v. United States, 812 F.2d 1387 (Fed. Cir. 1987). *See also* Federal Rule of Civil Procedure 56. The moving party has the burden of demonstrating the absence of genuine issues of material fact. Bromley Contracting Co. v. United States, 15 Cl. Ct. 100 (1988). All significant doubt over factual issues is resolved in favor of the party opposing the motion. Mingus, at p. 1390.

Appellant claims there was a nine year delay between WMATA discovery of the defective pads in 1982 and notification to Appellant of the defects by the Contracting Officer in 1991. Appellant claims that it is entitled to summary disposition as a matter of law on this basis and, in the alternative, that it is entitled to prevail even if the delay was considerably shorter; i.e., three years.

WMATA makes the following response to the nine year delay claim:

(1) that it notified Appellant's supplier Amber--Booth of the defects "in January, 1983" (WMATA responses to Interrogatory 19), and that Appellant learned of the defect through negotiations on another contract in September 1983; and

(2) that WMATA itself learned of the defect on the subject contract only in 1988. (Chen Declaration, ¶ 27).

WMATA's position is seemingly that it notified Appellant of the defect five years before it learned of it itself!

The claim of WMATA discovery in 1988 casts serious if not conclusive doubt on the WMATA assertions regarding 1983. Regardless of this, WMATA's assertion that Appellant was on notice in 1983 is, by itself, of no effect. WMATA's claim that Appellant had actual notice in September, 1983 is based in part on a Declaration by Paul C. Farmer, Senior Advisor in the WMATA Office of Procurement, that, in close out discussions on a separate contract, Appellant was "made aware of WMATA's overall isolation pad problem. . ." The Declaration continues that this "obviously included" the subject contract even though WMATA was not aware of any defect respecting the contract at the time. This is improbable conjecture. There is no support for a conclusion that awareness of an overall problem with the pads in 1983 would necessarily include a specific contract that WMATA itself says was not found to be defective until 1988. Also, Notice to a supplier of the defect (the other basis for the WMATA position) is not notice by WMATA to Appellant of a potential claim against it.

The Board is required to construe evidence before it in favor of the non-moving party, but evidence that is clearly without probative force, such as the conjecture we have noted, is not sufficient to raise a genuine issue of fact. Wright-Miller-Kane, 10A Federal Practice and Procedure § 2727 at 165 (1983). Thus, construing the record most favorably to WMATA, the evidence supports a conclusion that the defects in the subject contract were discovered by WMATA in 1988, not 1983. Because WMATA did not provide notice to Appellant of the defects under the subject contract until September 19, 1991, (Finding 20) the record thus shows a 3 year delay, 1988-1991, in providing notice.

Respondent is entitled to a reasonable time after discovery of a latent defect to advise Appellant of the matter. Bar-Ray Products v. U.S., 162 Ct. Cl. 836 (1963); Ball-Healy (JV), ENG BCA No. 5892, 96-2 BCA ¶ 28,580.

Respondent claims that the issue of whether notice was timely is a question of fact. However, it is plain that there are cases where reasonable minds cannot differ respecting certain periods of time. Williston, 5 Treatise on the Law of Contracts § 714 at 407 (3rd Ed., 1961); Ball-Healy (JV), at 142,660 - 142,661. It has been held, without qualification, that the question of what is a reasonable time is a question of law. Paine v. Central Vt. Railroad, 118 US 152, 6 S. Ct. 1019 (1886). (Promissory note overdue if not transferred within a reasonable time after its date). Also, in the District of Columbia, the same holding has been applied to the question of what is reasonable in dealing with the lapse of time necessary to convert an account rendered into an account stated. The Court ruled that this period is a reasonable time and what is reasonable is a question of law. In the circumstances of the case, two months was unreasonable. Reed Research v. Schumer Co., 243 F.2d 602, 604 (CA DC, 1957). The essential facts in the present matter regarding the time of discovery, 1988, to the time of notice, 1991, are known. This factor is further support for a conclusion that the reasonable time issue is a question of law. Lynx, Inc. v. Ordnance Products, Inc., 327 A.2d 502, 512 (Md, 1974).

WMATA claims it could not give notice until WMATA completed its investigations and had good evidence that the pads were latently defective. No authority is cited for this proposition which, if true, would routinely delay potential claim notices for months or years pending the results of scientific study or engineering review. There is no evidence that this is ordinary commercial practice. We believe that the reasonably prudent buyer with an apparently defective product in its hands makes prompt notification to a seller of a potential problem without engaging in a research project to determine the cause of the difficulty. It is not the buyer's responsibility at this point, if ever, to explain how and why the product failed. It is enough that the pads failed in circumstances indicating the likelihood of a latent defect or similar problem. All that was required of Respondent was to give notice of a potential claim after it discovered the defective pads. Ball-Healy (JV), at 142,662. The following comment appears in Williston with respect to § 2-607 of the Uniform Commercial Code which deals with the need for notice where a buyer discovers any breach:

> The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied on by the buyer, as under the section covering statements of defects upon rejection (Section 2-605). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer's rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.

Williston, 5 Treatise § 715 at 412.

In Rock Creek Ginger Ale Co. v. Thermice Corporation, 352 F.Supp 522 (DC DC 1971) the Court quoted the above comment and reviewed fact situations in which adequate notice was based on note of "some problem with the carbon dioxide" and of "difficulties . . . with the device." 352 F.Supp at 528-529. WMATA had adequate basis in its early and continuing collapsing slabs for an early and timely notice. It did not have to conduct a study to determine the reason for the pads failure in order to give the required notice.

In any event, WMATA had received the results of one study on earlier pad failures in August, 1982 (Finding 19), indicating defective pads. It thus had an early report that pads supplied by Amber-Booth were defective, and it had a basis for a potential claim notice when it discovered pad failure under the contract which is the subject of this appeal in 1988, without further study.

WMATA says further that, absent prejudice, contract notice requirements are not strictly enforced. Chemray Coatings Co., GSBCA No. 10,117, 91-1 BCA ¶ 23,356; Sky Top Plastics, GSBCA 7000,7110,7116, 91-1 BCA ¶ 23,350; Interlog Corp., ASBCA No. 21,212, 77-1 BCA ¶ 12,362. However, as the Board has noted, courts and boards dealing with delays of extraordinary duration tend to reach results without obvious consideration of the issue of prejudice. Ball-Healy (JV) at 142,661. No case has been cited by WMATA dealing with delay in the raising of the issue of a latent defect, or like issue; and, in Smith-Moore Body Co. v. Heil Co., 603 F. Supp 354 (ED Va 1985) the Court held no prejudice need be shown in considering such a delay.

Similar notice cases deal with failures by contractors to comply with notice provisions in government contracts:

> notice provisions in contract adjustment clauses [should] not be applied to too technically . . . where the Government . . . is quite aware of the operative facts. (Emphasis Supplied).

Hoel-Steffen Constr. Co. v. United States, 197 Ct. Cl 561, 573 (1972). *And see* Copco Steel and

Engineering Co. v. United States, 341 F.2d 590 (Ct. Cl., 1965) where the Court reviews mostly cases of government contract notice provisions not enforced against contractors. The failures were excused because the government had actual or imputed knowledge of the facts that were subject to the notice requirement, or waiver or similar circumstance was found. It is possible frequently to reason that notice is a technicality, and that the failure to render notice makes no difference. It is likely that some or many of these opinions involve an unspoken, but strict, construction of a government drafted form contract against the government. The same reasoning cannot apply here. The present matter involves the Inspection and Acceptance article of WMATA's own contract that WMATA is seeking to construe in its favor, and there is no basis to do so.

We conclude that, considering all the circumstances and WMATA's history with the Amber-Booth isolation pads, the reasonable time issue is one of law, and that the three years WMATA took to make the notification, 1988-1991, is unreasonable. *See* Ball-Healy (JV) and cases cited, at 142,661, that review holdings that shorter periods such as 17 months and "a little more than a year" are unreasonable as a matter of law. WMATA's earlier acceptance of the work (Findings 9-11) is final and conclusive under the terms of the WMATA contract. (Finding 4).

The delay in providing notice was unreasonable. The motion is GRANTED. The appeal is ALLOWED.

Date: November 2, 1998

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DONALD W. FRENZEN
Administrative Judge

I concur.

I concur.

_____
WESLEY C. JOCKISCH
Administrative Judge
Chairman

_____
HAROLD C. PETROWITZ
Administrative Judge

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I certify that the foregoing is a true copy of the Corps of Engineers Board of Contract Appeals Decision No. 5884, Appeal of Traylor Bros., Inc., & S&M Constructors (JV), under Contract No. 1F0021.

Date: November 2, 1998

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MARYELLEN D. SIMPSON
Recorder